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CASE NO. 91-1119

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HERBERT F. MCGILL,

Petitioner

v.

JACK R. DUCKWORTH, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is "actual knowledge" on the part of a defendant, the mental state a prisoner must establish to prevail in an Eighth Amendment claim against prison employees?

2. Can a federal court of appeals ignore the state law standard of review when deciding the appeal of a state law negligence claim filed pursuant to the federal court's pendant jurisdiction?

3. Should a Petition for Rehearing be Deemed Filed on the Day of Mailing?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceedings in the 7th Circuit Court of Appeals:

1. Herbert F. McGill
2. Jack R. Duckworth
3. Robert Bronnenberg
4. Brian Webb

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CASE NO._____

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner, HERBERT F. MCGILL, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on 17 September 1991.

OPINION BELOW

On 17 September, 1991 the Court Of Appeals entered its Opinion reversing a judgment in favor of the Petitioner and entering judgment on behalf of the Respondents. A copy of the 17 September 1991 Opinion, which is reported at 944 F.2d 344 is attached as Appendix "A".

On 30 November, 1989 the United States District Court for the Northern District of Indiana, South Bend Division, issued a thirty-three page Memorandum and Order denying Respondents' Motions for Judgment Notwithstanding the Verdict and New Trial. That Decision is reported at 726 F.Supp. 1144 and attached as Appendix "B".

JURISDICTION

On 17 September, 1991 the Court of Appeals entered its Opinion reversing a judgment in favor ot Petitioner and

entering judgment in favor of Respondents. [Appendix "A"].

A Petition for Rehearing with suggestion for Rehearing In Banc, was filed by mail on October 1, 1991. On October 4, 1991 the Seventh Circuit Court of Appeals ordered Respondents to file a response to the Petition for Rehearing. [Appendix "C"]. However, in the interim, Judge Easterbrook granted a Motion to Dismiss the Petition for Rehearing ruling the petition to be untimely and holding that a petition for rehearing is not deemed filed on the date of mailing. [Appendix "D"]. Subsequent motions to file the Petition Instanter and to Reconsider were also denied by Judge Easterbrook.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitutional Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unsual punishments inflicted.

2. United States Constitutional Amendment XIV...:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

3. 42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Since 1983 HERBERT F. MCGILL has been an inmate in the custody of the Indiana Department of Correction (DOC). In 1984 McGill was assigned by the DOC to the Indiana State Prison in Michigan City, Indiana. McGill is a white male who stands 5 feet 7 inches and weighs 122 pounds. [Tr. p. 40].

Because of his stature McGill became the object of homosexual harassment from other inmates. McGill requested a transfer to a less hostile institution, which although approved by his counselor, was denied by higher authority [Tr. p. 49-50]. McGill's situation was compounded when he testified against an inmate who assaulted a guard. After being assaulted because of his testimony McGill asked prison officials to place him in protective custody [Tr. p. 56].

Instead of being placed in a protective custody unit, however, McGill was placed in a disciplinary segregation unit. Disciplinary Segregation Units house inmates that commit serious institution rule violations. McGill was commingled with these disciplinary segregation inmates because of a policy established by two of the Defendants. That policy dictated that any inmate requesting protective custody after 2:30 p.m. (the time the administrative staff left the institution) would be placed in the disciplinary segregation unit regardless of whether vacancies existed on the protective custody units. [Tr. p. 321].

After three days on the disciplinary segregation unit McGill left his cell for the first time. McGill was immediately approached by two inmates who escorted him to the shower. In the

shower McGill was gagged with a washcloth and raped in the anus.

McGill sued two prison administrators, Duckworth and Bronnenberg, and six prison guards under 42 U.S.C. § 1983, maintaining that they violated the Eighth Amendment's prohibition of cruel and unusual punishment. McGill also presented a pendent claim of negligence under Indiana law. The case went to trial and the jury returned a verdict in favor of McGill against Duckworth, Bronnenberg and one of the six prison guards, Brian Webb. The jury found for McGill on both the Eighth Amendment and negligence claims.

The District Court upheld these verdicts in response to post-trial motions by the Respondents. The District Court concluded there was sufficient evidence for the jury to have found that Duckworth, Bronnenberg and

Webb were "deliberately indifferent" to McGill's safety. As noted, McGill was already being harassed because of his build and cooperation with authorities. Statistical evidence showed that the detention units had a higher incidence of violence and sexual attacks than the prison as a whole. A counselor on the detention units testified that when a protective custody inmate is placed in disciplinary segregation his troubles are just beginning. The counselor had seen many inmates assaulted on Disciplinary segregation units, "particularly if they were young, white boys trying to get away from population" [Tr. p. 178-180]. Bronnenberg himself admitted that "common sense dictates to watch protective custody request people" [Tr. p. 228]. Duckworth testified that it was good correctional practice to separate disciplinary segregation

offenders and that protective custody people weren't as dangeroug to one another as were disciplinary segretion inmates [Tr. p. 372]. Despite this knowledge Duckworth and Bronnenberg continued unchanged the policy of commingling the two classes of inmates.

Webb was the guard on the Unit when the rape occurred. Webb testified that he never left his post during that period, that he observed McGill the entire time and that nothing happened. Having found that the rape did occur, the jury could have inferred that Webb lied. McGill testified that when McGill tried to tell Officer Webb what had happened, Officer Webb cut him off with this statement, "Piss on you." The jury reasonably could have inferred that as he patrolled the detention unit before and during the attack, Officer Webb was

deliberately indifferent to the known risk of danger to McGill.

The instructions to the jury informed them they could find the Defendants liable if they knew or "should have known" of the risk to McGill. The Seventh Circuit Court of Appeals found this language to be erroneous holding that McGill had to show that the Defendants had "actual knowledge" of the threat to McGill's safety. The Seventh Circuit Court of Appeals reversed the Eighth Amendment judgment on that issue then went on to enter judgment for the Defendants by concluding that McGill could not make a case under the "actual knowledge" standard. The Court of Appeals did not stop there. The Court went on to reverse the state law negligence claim as well and again entered judgment for Defendants on the negligence claim.

Jurisdiction in the District Court was based on 28 U.S.C. § 1983. Jurisdiction of the Seventh Circuit Court of Appeals was based upon 25 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Judicially Amends 42 U.S.C. § 1983 to Exclude Actions by Prisoners; the Decision is in Conflict with the Decision of Another U.S. Court of Appeals and with Applicable Decisions of this Court

In Wilson v. Seiter, 111 Sup.Ct. 2321 (1991), this Court held that only by demonstrating a defendant's mental state may a prisoner establish that unpleasant happenings are punishment. The mental state referred to in Wilson was "deliberate indifference". The Seventh Circuit Court of Appeals has proceeded several steps beyond Wilson, however, by holding that only by showing that a defendant had "actual knowledge" of a problem could a plaintiff prevail on an Eighth Amendment claim. This decision is tantamount to amending 42 U.S.C. § 1983 to exclude actions by

prisoners because this burden can never be met. The Seventh Circuit Court of Appeals expressed concern that any standard less than "actual knowledge" would approach the imposition of absolute liability upon prison officials. Unfortunately, the Seventh Circuit's holding goes to the opposite extreme and grants virtual blanket immunity upon prison officials. The only way to prove a case would be for an inmate to specifically identify his attacker and have the defendants admit that the identification took place. Of course, it would be a deviation of human nature to expect any defendant to state that he was in fact aware of the risk. The approach of the Seventh Circuit also overlooks an undisputed fact of prison life. No communication by a prisoner is privileged. Written communications to counsellors and guards are transported

by inmate porters. Inmate clerks have access to prisoner files. Once an inmate identifies his potential attacker there will be several more potential attackers waiting in the wings because the inmate snitched on another inmate. Additionally, an inmate may know that he is in jeopardy but might not know who the potential attacker is. It is quite common for inmates to enlist the services of other inmates to conduct their ill-deeds.

If the holding of the Seventh Circuit were to stand, Indiana prison officials could house a female convict at an all male prison and not incur any liability if the female prisoner was raped by one of the male inmates. Under the "actual knowledge" standard, the defendants could state that they did not know that it was inmate Jones that was going to rape the female inmate and that

the female inmate did not tell them that it was inmate Jones she was afraid of. It is easy to claim "we did not know". The standard established by the Seventh Circuit Court of Appeals encourages looking the other way. That attitude is already evidenced by the failure of the defendants in this case to keep accurate records of inmate assaults despite an Indiana State Statute requiring that such records be kept.

In rendering their opinion, the Seventh Circuit Court of Appeals overruled three of their previous decisions. Namely, Benson v. Cady, 761 F.2d 335 (7th Cir. 1985); Richardson v. Penfold, 839 F.2d 896 (7th Cir. 1990); and Wilkes v. Young, 897 F.2d 896 (7th Cir. 1990). The instant decision is also in conflict with decisions from the Second Circuit and the Tenth Circuit. Stubbs v. Dudley, 849 F.2d 83, 85-87 (2nd Cir.

1988) cert. den., 109 S.Ct. 1095, 103 L. Ed. 2d, 230 (1989) and Berry v. City of Muskogee, 900 F.2d 1489, 1493-1495 (19th Cir. 1990). The decision is also in conflict with Wilson v. Seiter, 111 S.Ct. 2321 (1991) as nowhere in that decision does Wilson require actual knowledge to prove deliberate indifference.

2. By Reversing the State Law Negligence Claim in Favor of McGill the Seventh Circuit Court of Appeals Departed so Far From the Accepted and Usual Course of Judicial Proceedings that this Court Must Exercise its Power of Supervision

In McGill's failed attempt at filing a Petition for Rehearing, McGill pointed to eleven factual inaccuracies that were contained in the majority opinion. Based in large part upon these factual inaccuracies, the majority reversed a state law negligence claim in

favor of McGill and entered judgment in favor of the Defendants. Under Indiana law, "when a trial court tries an issue adversely to a party who has the burden of proof on that issue, the appellate court is not free to reweigh the evidence or judge the credibility of the witnesses. Reversal of the trial court is warranted only if the evidence which is not in conflict leads solely to a conclusion contrary to that reached by the jury." Get-N-Go v. Markins, 544 N.E.2d 484 (Ind. 1989). Despite the instructions of the Supreme Court of Indiana, the majority did in fact reweigh the evidence and rejudge the credibility of the witnesses. Judge Cudahy authored a dissenting opinion on this issue and wrote that the majority went to wholely implausible lengths to overturn a jury verdict of negligence. Judge Cudahy further stated that the

majority established a "novel (and unfashionable) approach".

By admission of one of their own members, the Seventh Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings and this Court must exercise its supervisory power to remedy that situation.

3. By Holding that McGill's Petition for Rehearing Would not be Deemed Filed on the Date of Mailing the Seventh Circuit Court of Appeals has Decided an Important Question of Federal Rules Which has Not Been, but Should be Settled by this Court

The Court of Appeals issued its decision on September 17, 1991. Accordingly, McGill's Petition for Rehearing would have been due 14 days from that date, which was October 1, 1991. On October 1, 1991 McGill filed his Petition for Rehearing by depositing same in the United States mail with sufficient

first class postage affixed. Pursuant to Rule 25, Federal Rules of Appellate Procedure, briefs shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail is utilized.

The Clerk accepted the Petition for filing even though it was not received until October 2, 1991. Thereafter the Court directed the Clerk to request counsel for the Respondents to file an answer to the Petition for Rehearing. In the interim, Respondents filed a Motion to Strike the Petition for Rehearing claiming that it was filed one day late, since it was not received in the Clerk's Office until October 2, 1991. Judge Easterbrook, the author of the majority opinion, granted the Petition holding that Petitions for Rehearing are not deemed filed on the date of mailing. [Appendix D]. McGill

then filed a Petition to File the Petition for Rehearing Instanter and a Motion to Reconsider, both of which were again denied by Judge Easterbrook.

It is McGill's position that a petition for rehearing is in fact a brief that should be deemed filed on the date of mailing. The position that a petition for rehearing is in fact a brief is based upon Federal Rule of Appellate Procedure 40(b) which states that petitions for rehearings shall be in a form prescribed by Federal Rule of Appellate Procedure 32(a). Federal Rule of Appellate Procedure 32(a) is the rule that sets forth the form of briefs. Federal Rule of Appellate Procedure 40(b) also states that copies of the petition for rehearing shall be served and filed as prescribed by Federal Rule of Appellate Procedure 31(b). Federal Rule of Appellate Procedure 31(b) is the

rule that sets forth the requirements for the filing and service of briefs.

According to the Notes of the Advisory Committee on Appellate Rules, the filing by mail exception for briefs was made in order to afford the parties the maximum time for preparation of a brief. Since the time for filing a petition for rehearing is even shorter than the time for filing a brief this same reasoning should apply. If a petition for rehearing is not deemed filed on the date of mailing, every counsel for a party that does not have an office in the city where the Court of Appeals sits is disadvantaged. In this case, if counsel worked in the city of Chicago he would have 14 full days to prepare the petition for rehearing as he could simply hand deliver the petition to the clerk's office. Counsel that live in Indiana, Wisconsin or Southern Illinois have only

11 or 12 days to complete a petition for rehearing as they must allow for the mailing time or travel time to Chicago. The Federal Rules of Appellate Procedure should not discriminate against a practitioner based upon geography. McGill's Petition for Rehearing should have been deemed filed on the date of mailing. This Court should decide this important question of Federal Appellate Procedure.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 90-1845 and 90-1945

Herbert F. McGill,
Plaintiff-Appellee/Cross-
Appellant

v.

Jack R. Duckworth, et al.,
Defendants-Appellants/Cross-
Appellees

Appeals from the United States
District Court for the
Northern District of Indiana,
South Bend Division.
No. 85-C-70-Robert L. Miller,
Judge

ARGUED FEBRUARY 20, 1991 -
DECIDED SEPTEMBER 17, 1991

Before WOOD, JR., CUDAHY, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge. Prisons are dangerous places. Housing the most aggressive among us, they place violent people in close quarters. Those

APPENDIX "A"

who have difficulty conforming to society's norms outside prison may find obedience no more attractive inside-and the threat of punishment for violence is diminished for one already serving a long term. Herbert McGill asks the federal courts to hold prison officials to answer for the injuries that their charges inflict on each other.

In 1983 McGill shot and killed (and then robbed) David Anderson. McGill pleaded guilty to voluntary manslaughter and robbery. He is serving a 27-year sentence in an Indiana prison. McGill was assigned to a cell in the general population and began to receive sexually suggestive notes and comments from other inmates. (McGill is slightly built, and word spread that the Anderson murder had homosexual overtones.) McGill asked to be moved to another institution; prison

officials denied this request but moved McGill closer to the officers' station.

McGill was labelled a "snitch" after he testified against an inmate who assaulted a guard. He asked to be placed in protective custody after he was assaulted because of his testimony. Prison officials obliged; McGill was sent to one of the prison's segregation units, I Cellhouse ("IDU"). IDU houses not only inmates in need of protection but also those on disciplinary segregation status. These groups were placed in the same unit temporarily: another unit of the prison houses only inmates in protective custody, but there was no room at the time for McGill. Prisoners in IDU are locked in their cells at least 23 hours a day. They may spend the remaining hour as they wish. They may shower or go to the gym with other inmates. Alternatively they may arrange

for individual time out of their cells (eliminating all risk of assault). The most timorous may choose to remain locked in their cells 'round the clock.

Soon after McGill arrived in IDU, two inmates on disciplinary status-Ausley and Halliburton-began harassing him through the bars of his cell. McGill asked prison officials to remove him from IDU because it wasn't what he expected; he did not tell them about the inmates' threats. (McGill did not want the guards to return him to the general population. He wanted, rather, to go to a protective-custody-only unit. But the prison could not accommodate that request without bumping another protective-custody inmate into the general population or the IDU.) On his third day in IDU, McGill was leaving his cell for a shower when Ausley approached him and made sexually suggestive comments.

McGill continued on to the showers. Ausley and Halliburton followed McGill down the range, threatening him as they walked along. On the way McGill encountered two correctional officers-Webb and Jones. He spoke with the two briefly about some property McGill was trying to locate but did not ask them for help. Ausley and three other men entered the shower room as McGill shampooed his hair. While the three stood guard at the door, brandishing homemade knives, Ausley raped McGill in the anus after gagging him with a washcloth. (The defendants denied that a rape occurred, but the jury resolved that question adversely to them.) Ausley and the others then escorted McGill back to his own cell.

McGill sued two prison administrators (Superintendent Jack Duckworth and Assistant Superintendent Robert

Bronnenberg) and six prison guards (Gordon Faulkner, Jeff Fisher, Jerry Jones, Jay Kirkpatrick, Cloid Shuler, and Brian Webb) under 42 U.S.C. § 1983, maintaining that they violated the eighth amendment's prohibition of cruel and unusual punishment (applied to Indiana through the fourteenth amendment) and the due process clause of the fourteenth. He also presented a pendent claim of negligence under Indiana law. The case went to trial with six defendants after McGill dismissed guards Kirkpatrick and Fisher. At the close of McGill's evidence, the district court granted a directed verdict in favor of two guards (Faulkner and Shuler) on all issues and a directed verdict in favor of four remaining defendants on McGill's due process claim only. The jury returned a verdict in favor of McGill against Duckworth, Bronnenberg and Webb

on both the eighth amendment and negligence claims, while absolving Jones on all claims against him. Special verdict forms revealed that the jury awarded $10,000 on each of the constitutional and tort claims, raising the question whether the jury meant to award a total of $10,000 or $20,000. The district judge decided that the jury intended one $10,000 award for McGill's damages, and entered judgment on the eighth amendment claim alone. He rejected defendants objections to the jury instructions and their request for judgment notwithstanding the verdict. 726 F.Supp. 1144 (N.D. Ind. 1989).

II.

Courts properly start with common law and statutory issues, seeking to avoid decision on constitutional questions. Doing so initially looks attractive here, for the district judge

concluded that the jury meant to return a single $10,000 award, which could be supported on other state-law or constitutional grounds. Two considerations, however, require us to consider both the common law and constitutional issues. First, McGill's cross-appeal contends that the jury really awarded him $20,000, half on the constitutional question. Second, McGill wants an award of attorney's fees under 42 U.S.C. §1988 as the prevailing party on the constitutional claim. Defendants argue, and McGill agrees, that an award of fees is not possible under state tort law. We must therefore address both constitutional and common law theories of liability, and we start with the eighth amendment.

A.

Ausley, who raped McGill, is not among the defendants. Indiana did not

harm McGill; rather it failed to prevent harm. Although the Supreme Court has never held that the eighth amendment required the state to protect prisoners from each other, the duty to do so is a logical correlative of the state's obligation to replace the means of self-protection among its wards. Deshaney c. Winnebago County Department of Social Services, 489 U.S. 189 (1989); Archie v. Racine, 847 F.2d 1211 (7th Cir. 1988) (in banc). A state with a constitutional duty to attend to prisoners' medical problems, even though the problems are not of the state's creation, Estelle v. Gamble, 429 U.S. 344 (1986), although decided under the due process clause of the fourteenth amendment, assumes that the prison system may not ignore prisoners' risk of harm at the hands of other inmates.

A prisoner's interest in safety does not lead to absolute liability, however, any more than the state is the insurer of medical care for prisoners. Not only Estelle but also more recent cases such as Wilson v. Seiter, 111 S. Ct. 2321 (1991), and Whitley v. Albers, 475 U.S.312 (1986), hold that the eighth amendment addresses only punishment. Whether an injury inflicted by fellow prisoners, or the pain of a medical condition, is "punishment" depends on the mental state of those who cause or fail to prevent it. If prison officials put McGill into the IDU so that a bigger inmate would have a better chance to rape him, then it is as if the officials inflicted that pain and humiliation themselves. Other mental states, including total indifference to risks, come so close to deliberateness that courts treat them alike. Thus, judges

speak, as in Estelle and Archie, of "deliberate indifference" or "recklessness" as the functional equivalent of intent. Although there are shadings of meaning here, total unconcern for a prisoner's welfare-coupled with serious risks- is the functional equivalent of wanting harm to come to the prisoner.

Once we equate "recklessness" with intent, however, it becomes important to give recklessness a definition that separates "punishment" (with which alone the eighth amendment is concerned) from the unwelcome injuries that occur when so many violent persons are locked up together. Wardens and guards do not desire these injuries, do not "intend" them in any useful sense. And although one could say that the state as an entity knows that intra-inmate violence is inevitable and intends the natural and probable consequences of its acts in

confining prisoners, the state as an entity is not a defendant here-and even if it were could not be held liable on this theory. In constitutional law there is a gulf between what a government intends and what it knows will happen. A state "intends" a consequence when it acts because of that effect; when it acts in spite of an effect it does not intend that effect. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). Common law courts have given the term "reckless" different meanings, depending on context, and these differences have consequences. We must select the meaning suited to the substantive constitutional provisions.

The instructions to the jury in this case came from Benson v. Cady, 761 F.2d 335 (7th Cir. 1985). Benson defined recklessness as disregarding a

substantial risk of danger that either is known or "would be apparent to a reasonable person" in the defendant's position. 761 F.2d at 339. This language is a staple tort law definition of recklessness, drawn out of William Prosser, The Law of Torts §34 (4th ed. 1971)-an objective standard, for it depends in part on what a "reasonable person" would perceive. Some cases in this circuit have applied the tort law's objective approach to eighth amendment questions after prison guards failed to protect their charges from attack. E.g., Wilks v. Young, 897 F.2d 392, 395 (7th Cir. 1988).

Other cases in this circuit take a different approach. Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), for example, asked how "recklessness" should be defined in the subjective sense that under Estelle (and

lately Wilson and Whitley) pertains to the eighth amendment. Franzen looked to the criminal law, which typically uses subjective mental standards, and held that recklessness violates the eighth amendment only if the prison official had "actual knowledge of impending harm, easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure even "gross negligence" in the tort sense are not enough. Id. at 652-53. Whitley cited Franzen with approval, 475 U.S. at 321, as did Wilson v. Seiter, 111 S.Ct. at 2325; our in banc opinion in Archie extended its approach to cognate questions under the due process clauses. 847 F.2d at 1218-20. Several of our opinions stand with Franzen in applying the subjective standard of recklessness when guards have failed to protect prisoners from assault. E.g.,

Santiago v. Lane, 894 F.2d 218, 221 n.7 (7th Cir. 1990); Goka v. Bobbit, 862 F.2d 646, 649-50 (7th Cir. 1988); Walsh v. Mellas, 837 F.2d 700, 702 (7th Cir. 1988); Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987). Cf. Salazar v. Chicago, No. 89-3551 (7th Cir. Aug. 7, 1991), slip op. 9-14 (using the criminal law definition of recklessness to identify punishment of pretrial detainees).

Decisions such as Benson, Richardson and Wilks are hard to reconcile with decisions such as Franzen, Santiago, Goka, Walsh, and Campbell. The district judge recognized the conflict and gave the instruction he did because he deemed Richardson the prevailing rule. 726 F.Supp. at 1151. Our court has not added to the lists recently, but the Supreme Court's opinion

in Wilson has substantial bearing, as we shall see.

Debating the meaning of "recklessness" might be quibbling-so McGill argues-but is not. Prisoners are dangerous (that's why many are confined in the first place). Guards have no control over the temperament of the inmates they supervise, the design of the prisons, the placement of the prisoners, and the ratio of staff to inmates. Some level of brutality and sexual aggression among them is inevitable no matter what the guards do. Worse: because violence is inevitable unless all prisoners are locked in their cells 24 hours a day and sedated (a "solution" posing constitutional problems of its own) it will always be possible to say that the guards "should have known" of the risk. Indeed they should, and do. Applied to a prison,

the objective "should have known" formula of tort law approaches absolute liability, rather a long distance from the Supreme Court's standards in Estelle and its offspring.

Although the guards can influence the number of assaults, many of the levers that increase or decrease risk are manipulated by others. The size of prisons, the number of separate areas, and so on, are in the hands of the state. Legislatures decide how many prisons to build (and how many guards per prisoner to hire); architects design the buildings; judges fill them. Crowding is endemic, as taxpayers reluctant to foot the bill for increased space also clamor for longer sentences that may increase the prison population. Administrators in many states (Indiana among them) consequently are unable to house each inmate only with those of a

similar status. A Herbert McGill will be small, young, labelled as a snitch, and therefore be at high risk no matter where he is placed-and the defendants, who know the risk unless they are unbelievably dense, have limited options in choosing his placement. The "should have known" approach allows plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control. It may be appropriate to require "the state" (to personify a complex of persons and traditions) to bear these costs, so that it considers them when deciding how many prisons to build and whether to increase the sentences for crimes. However valuable this may be as a tort rule applied to the states, it has tenuous standing as an interpretation of the eighth amendment applied to guards and wardens.

When deciding Davidson, a prison assault case under the due process clause, the Court made clear that failure to prevent aggression is actionable only if intentional. 474 U.S. at 348. Wilson shows that shifting ground to the eighth amendment does not make it easier for the prisoner to recover. Wilson resolved the conflict between the objective and subjective understandings of recklessness in favor of Franzen's subjective standard. Wilson holds that only by demonstrating the defendants' mental state may a prisoner establish that unpleasant happenings are "punishment". In the process the Court rejected objective approaches like the one in Benson. The Supreme Court relied on our survey of the language and history of the "cruel and unusual punishments" clause in Franzen and concluded that, no matter how

deplorable, prison conditions that are undesired are not "punishment". 111 S.Ct. at 2324-26. Wilson's understanding of intent tracks our own in Archie, 847 F.2d at 1219, which explicitly adopted the subjective (criminal law) sense of recklessness. Franzen therefore represents the law of the circuit. Contrary expressions in Benson, Wilks and Richardson do not survive Wilson. See also Salazar (disapproving Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982), the parallel to Benson, Wilks and Richardson for pretrial detainees).

It follows that the instructions to the jury were erroneous to the extent they allowed the jury to find the defendants liable if they "should have known" that McGill was at risk. Defendants maintain that McGill would not prevail under the approach of Franzen,

so that there is no point in remanding for a second trial. McGill had to show that the defendants had actual knowledge of the threat Ausley posed, that the rape was readily preventable, but that instead in intervening the guards allowed Ausley to proceed. Proving (as the jury found McGill did) that the guards should have known of Ausley's threat is not enough. The defendants say that McGill had no evidence to make out his case under Franzen.

A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. E.g., Santiago, 894 F.2d at 223-24; Goka, 862 F.2d at 647-48; Walsh, 837 F.2d at 795-96, 798. McGill admits that he did not complain: He testified that he never told any of the defendants that Ausley had threatened him. The only

complaints McGill made to prison officials came while he was in the general population after being harassed as a snitch: he asked for protective custody and got it. Other circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage. See Ruefly v. Landon, 825 F.2d 792 (4th Cir. 1987); and Blankenship v. Meachum, 840 F.2d 741 (10th Cir. 1988). Cf. Bell v. Stigers, 937 F.2d 1340 (8th Cir. 1991) (same principle applied to suicide). These decisions are sound and require judgment for the defendants. McGill's is an easier case, for to the extent the defendants knew of threats they took immediate action to remove McGill from the general population. It makes no sense to infer that they wanted him humiliated, or didn't give a fig for his welfare, when they acted promptly to

protect his safety. The eighth amendment does not guarantee success.

McGill tried to demonstrate the defendants' knowledge of an impending attack by showing that they knew he was a member of two groups that face a higher risk of assaults: (1) small, young prisoners, and (2) those in protective custody. The second strikes us as topsy-turvy. That McGill was in protective custody demonstrates that the defendants were trying to aid him, not that they intended his injury. McGill says that the defendants knew that putting small, young protective custody inmates in the same unit as disciplinary status inmates would lead to trouble. During the first three months of 1984 five violent incidents took place in the segregation unit, all involving inmates in protective custody. McGill then argues that "common sense" dictates tha

inmates under protective custody should not be placed with inmates on disciplinary status. This is a species of the "should have known" approach-and it fixes liability on guards for prison housing arrangements that they cannot control. It shows vividly how McGill's analysis holds guards personally liable for the consequences of budgetary decisions made elsewhere. Inmates can be classified into innumerable groups such as "young" or "small". Half of all prisoners are smaller than average, and we may assume that they face higher risks. This hardly shows that the guards wanted injury to come to McGill, or did not care whether it did; it does not even show that McGill faced substantial risk. The record does not show how many protective custody inmates passed through the IDU in the first quarter of 1984; we know that only five

of what must be a much larger number were assaulted. Prisoners in protective custody are no saints themselves (McGill himself is in prison for killing another person in a rage). Inmates in protective custody may detest each other. McGill would have been at some risk anywhere.

Nothing in this record inplies that the warden or guards put McGill in the IDU because of, rather than in spite of, the risk to him. The risk in the general population would have been greater, and evicting another inmate from the unit dedicated to protective custody, in order to make room there for McGill, would have shifted the incidence of risk without reducing risk to vulnerable inmates as a group. Cf. Hernandez v. New York, 111 S.Ct. 1859, 1866 (1991) (reiterating that for constitutional purposes a state actor dies not "intend"

anticipated but unwelcome consequences of acts undertaken for other reasons). McGill does not dispute the defendants' submission that they would have liked to separate all protective custody inmates from all disciplinary in,ates but could not because of a lack of space and money-things that only the legislature can provide. McGill put in no evidence that some alternative strategy the defendants could have followed within their budget would have reduced the injury rate. And even if he had proved this, he would have established only negligence. The administrative defendants are entitled to judgment as a matter of law.

Brian Webb presents a different situation. He was in charge of monitoring the shower area to protect the inmates from each other. Webb left his post without authorization and admitted

at trial he was wrong. McGill's theory is that Webb left to take an inmate to the hospital. A prison log sheet shows that Webb sighed out to the hospital at the time that McGill was assaulted. Why this is even negligence eludes us. It violated the prison's rules, to be sure, but under Estelle prisons must provide medical care for their inmates. An inmate with a problem requiring hospitalization takes priority. You can imagine the reaction if Webb had continued patrolling th th shower while the other inmate's medical problem went unattended. Would Webb have had a good defense to the other inmate's eighth amendment suit that he had to remain on station, until relieved, lest mayhem break out in the shower? McGill introduced no evidence that Webb knew that McGill was about to be raped. (McGill admits that he spoke to Webb on his way

to the shower and expressed no fear of an impending attack.) Is Webb to be held liable on the ground that he was supposed to know McGill's danger better than McGill himself? That would be the "should have known" approach run riot.

Estelle and subsequent cases equate "deliberate indifference" with intent. This seeming oxymoron has given us, in company with other courts of appeals, fits. How do we simultaneously honor both the "deliberate" and the "indifference" aspects? Criminal law suggests a way. Suspecting that something is true but shutting your eyes for fear of what you will learn satisfies scienter requirements. Going out of your way to avoid acquiring unwelcome knowledge is a species of intent. See United States v. Giovannetti, 919 F.2d 1223, 1226-29 (7th Cir. 1990); United States v. Ramsey, 785 F.2d 184, 189-91 (7th Cir. 1986), being

an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent. Giovannetti, 919 F.2d at 1228; Ramsey 785 F.2d at 189. because it is sufficient for criminal liability it is sufficient for liability under the eighth amendment's subjective standard. But McGill did not pursue this avenue at trial; the jury was never given an "ostrich" instruction of the kind we discussed in Ramsey, and we need not speculate on where this possibility may take us tomorrow.

B.

McGill won a verdict on his state law negligence claim even though the district judge eventually entreed judgment on the eighth amendment claim alone. McGill asks us to invoke the special verdict on negligence to support $10,000 in damages. Duckworth, Bronnenberg, and Webb argue there is

insufficient evidence to allow a jury to deem them negligent, and that all all events McGill assumed the risk by leaving his cell and proceeding into the showers when he knew that Ausley and pals were on his heels.

Indiana requires prison officials and guards to take reasonable precautions to preserve an inmate's health and safety. Johnson v. Bender, 174 Ind.App. 638, 642, 369 N.E.2d 936, 939 (3rd Dist. 1977); Roberts v. State, 159 Ind. App. 456, 462, 307 N.E.2d 501, 505 (2nd Dist. 1974). We may assume that the defendants breached this duty- Duckworth and Bronnenberg by failing to take greater care to see that disciplinary status inmates were separated from those in protective custody, Webb by leaving his post without authorization. Assuming negligence is a dubious step. Duckworth and Bronnenberg

assert, without contradiction in the record, that any alternative housing arrangements within their budget would have been more dangerous for protective custody inmates. McGill points to no equally affordable option that would have been safer for inmates as a group, and McGill has no entitlement to be preferred over others. Nonetheless, we pass this by, as the defendants focus their energy on the question whether McGill assumed the risk of attack.

"Incurred risk" (Indiana's mixture of contributory negligence and assumption of risk) is an affirmative defense on which the defendants bear the burden of proof. Get-N-Go, Inc. v. Markins, 544 N.E.2d 484, 486 (Ind. 1989); Ridgway v. Yenny, 223 Ind. 16, 22-23, 57 N.E.2d 581, 583 (1944). Incurred risk bars the plaintiff from recovering anything even though the defendant was negligent.

Ridgway, 223 Ind. at 22, 57 N.E.2d at 583. The Supreme Court of Indiana describes the defense as one that focuses on the plaintiff's actual knowledge of a specific risk and voluntary acceptance of that risk. Get-N-Go, 544 N.E.2d 552, 554-55 (Ind. 1987). It requires looking at the plaintiff's "state of venturousness". Id. at 555.

McGill's lawyer probed his knowledge of the danger and acceptance of the risk. After establishing that Ausley and Halliburton had been threatening McGill since the day he took up residence in IDU, and that Ausley began to harass him immediately after he left his cell to take a shower, they had the following exchange:

> Q: Why did you still go in the shower if you were receiving these threats?
>
> A: Well, I figured. . . when I went in the shower that . . . since I had my shower thing

and [Ausley and the others] were by themselves, I didn't figure, you known, nothing would happen . . .

Q: Could you have gone back in your cell and close the door?

A: Yes.

Q: Is there some reason you didn't do that?

A: I don't know why.

Shortly thereafter McGill revealed that, with Ausley not far behind, he encountered Officers Jones and Webb on his way to the shower, spoke to them about some property he was trying to locate, but said nothing about Ausley's threats.

Disputes about knowledge and mental states-disputes, that is, of the kind the defense of incurred risk engenders-are classic questions of fact for resolution by the jury. See Mauller v. Columbus, 552 N.E.2d 500, 502 (Ind.App. 1st Dist. 1990); Kroger Co. v. Haun, 177 Ind.App. 403, 407, 379 N.E.2d 1004, 1007

(2d Dist. 1978). Still, an Indiana court may find incurred risk as a matter of law if the plaintiff's own evidence shows that he had actual knowledge of the specific risk and understood and appreciated the risk. Beckett, 504 N.E.2d at 555-56; Mauler, 552 N.E.2d at 502-03. Continued exposure to a known danger is incurred risk only if there is a "reasonable opportunity to escape from it", and the exposure was not the result of inducement that negates the element of voluntariness. Get-N-Go, 544 N.E.2d at 487. McGill relies on cases dealing with continued exposure by persons who have no safe way to escape. Get-N-Go presented such a problem. An elderly woman walked several steps into a parking lot before she discovered how icy it was. Faced with a choice of retreating or proceeding-both of which involved walking on ice-she chose to

proceed and slipped. The Supreme Court in Indiana held that someone whose only way out of a pickle created by the defendants is to continue on through the hazard has no reasonable opportunity to escape from the dangerous condition and therefore does not incur the risk. 544 N.E.2d at 487. See also Ridgway, 57 N.E.2d 583-84 (plaintiff was driven into remote area during snowstorm before driver started driving dangerously and crashed); Alexandria v. Allen, 552 N.E.2d 488, 497-98 (Ind.App. 2d Dist. 1990) (fireman drove broken fire truck when all others were broken too); Howell v. Midwest Smorgasbord, Inc., 486 N.E.2d 16, 18 (Ind.App. 2st Dist. 1985) (plaintiff walked part way across wet floor before realizing the danger). But when the plaintiff's own evidence establishes that he knew of a specific risk and consciously proceeded dispute the fact

that he easily could have avoided the problem, Indiana treats him as incurring the risk. Mauller approved of summary judgment against a softball player who way unsafe conditions around home place on a softball field but slid into home anyway. 552 N.E.2d at 503-04. See also Beckett, 504 N.E.2d at 555-56 (summary judgment against baseball player who collided with another player during practice); St. Mary's Byzantine Church v. Mantich,505 N.E.2d 811, 813-14 (Ind.App. 3d Dist. 1987) (reversing jury verdict for plaintiff who slipped on a steep ramp when there were other alternatives). The dividing line lies between cases where the plaintiff's alternatives are "fraught with their own perils" and those where the plaintiff has safe alternatives that would avoid danger. St. Mary's, 505 N.E.2d at 814.

If this were a suit against Ausley and his confederates, McGill's failure to return to his cell or alert the guards would be no defense. No one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood. Rape is an intentional tort, and defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts. W. Page Keeton and others, Prosser and Keeton on Torts 462 (5th ed. 1984). So, too, these defenses often fall away when the defendant acts recklessly or wantonly. Ibid. But McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their won safety,

and we are persuaded that the courts of Indiana would not require Webb (let alone the warden) to compensate McGill for injuries Ausley inflicted, after McGill passed Webb in silence.

This case lies closer to Beckett, St. Mary's, and Mauller than to cases such as Get-N-Go, Ridgway and Hollowell. McGill knew, far better than his guards, of a risk of attack: Ausley had been making sexual threats since the day McGill arrived in IDU. McGill admitted he had easy means of avoidance: he could have retreated to his cell, locked the door, and waited to take his shower. Retreat did not imply that McGill had to give up showers, for he could have arranged for an individual shower period. He did neither; he chose to continue on to the showers, believing that "nothing would happen". McGill had yet another chance to escape danger just

before he entered the showers: he encountered Officers Webb and Jones on the way, but made not a peep about Ausley. McGill was not trapped in a situation with risks at every turn.

McGill calls attention to his testimony that after he came out of his cell, Ausley began pushing him toward the shower and threatening to throw him over the cell range if he resisted. The district court saw this as evidence that McGill's exposure to the risk was the result of "inducement to continue despite the danger" and did not constitute incurred risk. 726 F. Supp. at 1157-58, citing to what happened after McGill left his cell, saw Ausley heading his way making threats, and made the decision to take a shower anyway. McGill could have stayed in his cell or arranged for individual shower and recreation periods-and as we have

emphasized, he could have alerted the guard she passed on the way. (A belief McGill kept his mouth shut as he passed Jones and Webb only because he feared immediate attack collides with McGill's own testimony that he does not know why he failed to alert the guards.) McGill's decision to accept the risk precludes blaming the guards and higher-ups in the prison system.

III.

McGill raises three issues by cross-appeal. The first, his objection to the district court's decision to enter judgment for $10,000 on the eighth amendment claim alone, is of no moment given our conclusion that he cannot recover under either theory. The other two issues require only brief comment.

McGill wanted to call three of the defendants (Faulkner, Shuler and Jones) as witnesses. He says that he expected

the, to attend the trial because he had listed them as witnesses on several pretrial documents. One week before trial McGill learned the three did not plan to attend, and on the first day of trial he asked the district judge to order them to do so. Persons need not attend the proceedings just because they have been named as parties, so Judge Miller invited McGill to issue subpoenas, but he says that he preferred to rely on Judge Miller's "inherent power as a judge" to compel defendants to attend trial.

McGill should not have resisted the court's repeated invitations to subpoena the three defendants. Fed. R. Civ. P. 45(a) provides a simple procedure: a litigant asks the clerk of the district court (not the district judge) to command someone to attend trial and give testimony, The judge has the power to

enforce the subpoena if the witness opposes the demand to appear. Maybe McGill knew (or feared) that the three defendants were outside the court's subpoena power, which under Rule 45 (e)(1) is limited to its district and a 100 mile radius around the courthouse. The record shows that Jerry Jones was working in California at the time of trial. Faulkner and Shuler no longer worked for the Indiana prison system, but the record is silent on their domicile at the time of trial. The way to test whether a witness is beyond a federal court's power to hale him into court is to issue a subpoena under Rule 45(1). Although federal judges have some "inherent powers", these are limited by statutes and rules. See Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2134 (1991). Relying on "inherent powers" to compel the attendance of a

witness who is outside the court's subpoena power would make the restrictions in Rule 45(e) meaningless. McGill chose not to subpoena the three, even after the judge insisted that this was his only recourse. The district judge was correct in refusing to order their appearance in the absence of a subpoena. Cr. United States v. Burton, 937 F.ed 324, 329 (7th Cir. 1991); United States v. Taylor, 562 F.2d 1345, 1361 (2d Cir. 1977); and Johnson v. United States, 426 F.2d 651, 656 (D.C. Cir. 1970)(in banc), all dealing with the nearly identical provisions of Fed. R. Crim. P. 17. At all events, McGill was none too specific about the testimony he expected these witnesses to provide. He told Judge Miller only that they were "necessary" and that he hoped to force them to "implicate themselves", but he did not explain why or how. It is no abuse of

discretion to refuse to compel the attendance of a witness when the party requesting the order not only disdains proper procedures but also fails to explain who the testimony is needed.

McGill also says that he should have received a hearing before being reassigned from the general population to the disciplinary unit. Yet McGill asked to be reassigned to a unit for greater protection. Indiana did not shortcut necessary procedures; it acceded to a request. The due process clause give an opportunity for a hearing, which people can elect to forego. That the request is ill-starred is irrelevant to the question whether the state skimped on procedures. In the end McGill is repackaging his eighth amendment claim that he should have been sent to a protective custody only unit rather than the IDU. His problem is not that

he was moved without a hearing, but that he did not like the destination. It is a complaint about the substance of the assignment, not the procedures (or lack of them) used to get him there. The defendants were entitled to a directed verdict on McGill's due process claim.

In the defendants' appeal, No. 90-1845, the judgment is reversed. In McGill's own cross-appeal, No. 90-1945, the judgment is affirmed.

CUDAHY, Circuit Judge, concurring in part and dissenting in part.

The majority goes to wholly implausible lengths to overturn a jury verdict of negligence. It argues that McGill somehow voluntarily assumed the risk of rape by leaving his cell for the unexceptionable purpose of taking a shower and failing to run for home when an unsavory fellow prisoner popped up at his heals. I don't know what his

approach to risk assumption in rape cases holds in store for multitudes of females innocently walking the streets or taking the sun on the beach. But it certainly is a novel (and unfashionable) approach.

McGill testified that, soon after he left his cell, Ausley began pushing him toward the shower and threatened to throw him over the cell range if he offered any resistance. The district court found, therefore, that McGill did not voluntarily incur th risk of rape but instead was induced to continue despite the danger. For under Indiana law, a plaintiff assumes the risk of a known danger only of there is as reasonable opportunity to escape from it and if the exposure to the risk was not itself the result of inducement negating voluntariness. In Get-N-Go, Inc. v. Markins, 544 N.E.2d 484 (Ind. 1989), for

example, an elderly woman took several steps into a parking lot before she realized how icy it was. Faced with the choice of retreating or proceeding, both of which presented the risk of falling on the ice, she chose to proceed and fell. See also Hollowell v. Midwest Smorgasbord, Inc., 486 N.E.2d 16 (Ind. App. 1985) (no assumption of risk when plaintiff continued walking on wet floor after he had walked part way before realizing the danger).

Attempting to distinguish Get-N-Go, the majority suggests that McGill possessed a number of alternatives: he could have retreated to his cell and locked the door as soon as he saw Ausley coming his way, he could have arranged in advance for an individual shower period or he could have alerted the prison guards to his danger. But the majority's perception of McGill's

situation runs up against a stone wall of stark reality. For, as the majority opines (without contradiction from me), "prisons are dangerous places." An inmate's decision to leave his cell is always frought with peril. But certainly no inmate (no matter how "attractive") assumes the risk of rape simply by leaving his cell when he knows other inmates lurk at large. The unsoundness of this proposition is revealed by extending it to heterosexual conduct in the world at large. Admittedly, this is a negligence action against a third party, not a suit against the rapist, but the burden of an exaggerated risk assumption doctrine upon rape victims in any such situation conflicts with the trend of the law.

In any event, the elderly woman in Get-N-Go could have refrained (as McGill is urged to do here) from leaving her

home in inclement weather when she was well aware of the icy conditions outside. McGill's situation precisely parallels that of the plaintiff in Get-N-Go: once he left his cell to take a shower diring the one-hour recreation period and discovered Ausley close on his heels threatening to throw him over the cell range, his options ran out. McGill's decision to proceed to the showers and not request help from the prison guards, while he was terrified by the threatening Ausley close behind, certainly does not amount to a deliberate or conscious acceptance of risk. See Mauller v. City of Columbus, 552 N.E.2d 500 (Ind.App. 1990)("By definition . . . the very essence of incurred risk is the conscious, deliberate and intentional embarkation upon a course of conduct with knowledge of the circumstances.'") (quoting Power

v. Brodie, 460 N.E.2d 1241, 1243 (Ind. App. 1984).

The burden of establishing the affirmative defense of assumption of risk, moreover, lies with the defendants and not with McGill. The Indiana Supreme Court instructs that "[w]hen a trial court decides an issue adversely to a party who has the burden of proof on that issue, the appellate court is not free to reweigh the evidence or judge the credibility of the witnesses. Reversal of the trial court is warranted only of the evidence which is not in conflict leads solely to a conclusion contrary to that reached by the jury." Get-N-Go, 544 N.E.2d at 486. Attempting to draw a fine line between "cases where the plaintiff's alternatives are 'fraught with their own perils,'" supra at 15, and cases where "the plaintiff has safe alternatives that would avoid

danger", supra at 15, the majority strains to put this case in the "safe alternatives" category. I am not sure the issue is even close here, Certainly evidence does not lead[] solely to a conclusion contrary to that reached by" the district court. Likening this case to Get-N-Go, the district court reasonably concluded, based upon all the evidence, that McGill did not voluntarily assume the risk of a homosexual rape. It is certainly not for us to reweigh the evidence and second-guess the district court's determination on this sensitive, fact-intensive question. To do so is virtually to exculpate prison authorities in advance for any responsibility to provide protection against homosexual

rape. I therefore respectfully dissent.[1]

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

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[1] I agree that the Eighth Amendment theory may not fly because McGill could not establish that the defendants had actual knowledge of the threat of rape and yet failed to intervene.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

HERBERT F. MCGILL, Plaintiff,	)	
vs.	)	CAUSE NO. S85-70
JACK R. DUCKWORTH, et al., Defendants.	)	

MEMORANDUM DECISION

On September 28, 1989, following four days of trial, a jury returned a verdict in favor of Plaintiff Herbert F. McGill and against defendants Jack R. Duckworth, Robert Bronnenberg, and Brian Webb. Judgment was entered against those defendants the following day. The cause is now before the court on those defendants' motion for judgment notwithstanding the verdict, for new trial, or for amendment of judgment.

Mr. McGill's evidence indicated that while he was an inmate at the

Indiana State Prison, he was placed on "protective custody" in a cell on "IDU", a unit primarily used to house inmates assigned there for disciplinary purposes. Shortly after his assignment to IDU, Mr. McGill was sodomized at knifepoint in the shower by fellow inmate Arthur Ausley. He brought this suit against these defendants and others. He claimed, among other things[1], that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishment and so were liable to him under 42 U.S.C. § 1983. He also claimed that the defendant were negligent toward

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[1] Mr. McGill also claimed that the Defendants had violated his due process rights by placing him in the detention unit. The court granted the defendants' motion for directed verdict on that claim at the conclusion of the Plaintiff's evidence in chief.

him and so were liable to him under Indiana's Tort Claim Act, IND. CODE 34-4-16.5. The jury found for Mr. McGill on both claims and awarded him compensatory damages but no punitive damages.

The defendants raise several arguments in support of their motion for judgment notwithstanding the verdict. They contend that the evidence was insufficient to establish a violation of the Eighth Amendment and make six points in support of that argument. They contend further that with respect to the Eighth Amendment claim that the evidence was insufficient to establish any causal connection between their acts or omissions and Mr. McGill's injuries and make four points in support of that argument. They argue that the evidence was insufficient to support Mr. McGill's state negligence claim and make four points in

support of that argument. They raise four arguments for immunity under Indiana's Tort Claims Act.

In support of their motion for new trial, the defendants raise several arguments concerning the court's evidentiary rulings and jury instructions. Finally, the defendants argue that the judgment should be amended to avoid a double recovery for the plaintiff.

The court first addresses the motion for new trial, then turns to the motion for judgment notwithstanding the verdict, and finally to the motion to amend the judgment.

In their motion for a new trial, the defendants challenge an evidentiary ruling, reference to an Indiana statute, and three final instructions.

A.

At the trial's outset, the court granted Mr. McGill's motion in limine

concerning the defendants' intent to offer evidence that Mr. McGill previously had engaged in homosexual activity. The defendants argued them, as they do now, that such evidence would be admissible on the issues of consent and damages, explaining that "[i]t was offered to rebut a natural presumption, based on every day experience, that a given man would never consent to homosexual acts" and "to show that Plaintiff may not have suffered th mental anguish from a homosexual experience." Defendants' Memorandum in Support of Post-Trial Motions, at 2-3.

The defendants' motion does not identify the excluded evidence, but it is the court's recollection that during Mr. McGill's guilty plea to state manslaughter charges or in his confession with respect to the homicide, he admitted that he had engaged in an act

of oral sex with his male victim. The record does not include Mr. McGill's confession or guilty plea proceedings, but it appears that an order in limine is reviewable on appeal without an in-trial offer of proof. Harris v. Davis, 874 F.2d 461, 464 n.5 (7th Cir. 1989) ("In this circuit, however, an unsuccessful motion in limine serves to preserve an issue for appeal.").

The court remains convinced that exclusion of the evidence was proper. Federal Rule of Evidence 404(b) governs civil cases as well as criminal cases.[2] Harris v. Davis, 874 F.2d 461 (7th Cir. 1989). The Seventh Circuit has established a four part test that must be

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[2]The parties also have discussed the impact of Federal Rule of Evidence 412. Because this is not a criminal case, that Rule does not apply.

satisfied for evidence of other acts to be admissible under Rule 404(b). United States v. DeGeratto, 876 F.2d 576, 584-585 (7th Cir. 1989); United States v. Shackleford, 738 F.2d 776,779 (7th Cir. 1984).

1. The evidence must be addressed to some matter in issue other than propensity to commit such acts. Rule 404(b) provides that, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The defendants' offered use of the evidence on the issue of consent would seek to create the precise inference forbidden by Rule 404(b): Mr. McGill is the sort of person who engages in consensual homosexual activity because he did it before, so he must have done it this time. In other words, Mr. McGill acted in conformity with his

character, which entails consensual homosexual activity. See generally United States v. Beasley, 809 F.2d 1273, 1277-1279 (7th Cir. 1987) (discussing "pattern" evidence).

The second sentence of Rule 404(b) sets forth other purposes for which "other act" evidence may be admissible, such as proof of motive[3], opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of Mr. McGill's

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[3] In Hernandez v. Cepeda, 860 F.2d 260, 265 (7th Cir. 1988), a § 1983 suit for use of unreasonable force in arrest, the court held that the defendant police officer could show that the plaintiff was being arrested for rape and aggravated kidnapping, to show the Plaintiff's motive to resist arrest. The defendants here did not argue that Mr. McGill's prior homosexual activity gave him a motive to engage in it again. Such in argument would eradicate the line between "propensity" evidence and "motive" evidence.

homosexual history would not have served any of these purposes.

2. The other act must be similar, and close enough in time, to the act in issue to be probative. The prior act was similar insofar as it entailed sexual activity between males, but the defense did not suggest that the prior act involved anal intercourse. Moreover, it is questionable whether a single prior sexual act, whether homosexual or heterosexual, is probative of later willingness to engage in sexual conduct with another. See Note, If She Consented Once, She Consented Again-- A Legal Fallacy in Forcible Rape Cases, 10 Vol. U.L. Rec. 127 (1976) ("giving away sex has no more in common with rape than giving away money has in common with armed robbery").

3. The evidence of the other act must be sufficient to allow the trier of

fact to find that Mr. McGill engaged in the prior act. Huddleston v. United States, 485 U.S. 681 (1988). Because the defendants sought to introduce Mr. McGill's statements at his guilty plea, this requirement would have been satisfied.

4. Finally, the probative value of the evidence must outweigh the danger of unfair prejudice, As noted above, the evidence has little or no permissible probative value on the issue of consent. Unless Mr. McGill claimed a loss of virginity, it is difficult to see how the proffered evidence would have been probative on the issues of damages. At the time of the order in limine, the court indicated that it would reconsider the order if Mr. McGill raised such a claim. The defendants now argue that Mr. McGill did so in his final argument. The proper remedy would

have been to strike the argument and instruct the jury to disregard it, but the defendants made no objection to any such indirect assertion. Accordingly, the court deems it inappropriate to consider that argument.

The Defendants proffered evidence would have done nothing more than portray Mr. McGill as a person to whom the jury should accord lesser respect because of his past act of homosexuality. Based on the other evidence presented at trial, the prior act would not have been probative of any permissible inference. Any permissible probative value that might be attributed to the prior act would have been so slight as to have been dwarfed by the potential for unfair prejudice.

The defendants argue that the order in limine deprived them of the opportunity to present their defense that the

act between Ausley and Mr. McGill was consensual. The court did not exclude the defense; indeed, Dr. Doster's testimony can only be viewed as raising an inference that consensual sexual contact left the medical evidence upon which Mr. McGill relied. The order in limine simply deprived the defendants of evidence barred by Rule 404(b).

B.

The defendants argue that, "During Plaintiff's case, the Court read to the jury Ind. Code § 11-11-6-1 and instructed the jury that violation of that section 'may be negligence.'" The defendants' recollection of the trial is inaccurate. At the outset of the second day of trial, Mr. McGill's counsel asked the court to take judicial notice of IND. CODE 11-11-6-1(a), and the defense objected on the grounds raised here. The court granted the request for

judicial notice and read the statute to the jury. The court did not, however, instruct the jury that violation of the statute may be negligence.[4] Before and after reading the statute to the jury, the court informed the jury that state statutes do not set federal constitutional standards and that the final instructions would inform the jury as to the standards governing Mr. McGill's federal claims.

The statute was pertinent to the evidence before the jury and to the plaintiff's claims as they then stood. Mr. McGill based his Eighth Amendment claim in part on a "reign of terror"

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[4] Mr. McGill tendered a proposed final instruction that would have told the jury that if it were to find that any defendant violated the statute, the jury "must find as a matter of law that the Defendant was negligent." Plaintiff's Tendered Instruction No. 44. The Court declined to give that instruction.

theory[5] first articulated in Woodhouse v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973). Mr. McGill attempted to demonstrate a "reign of terror" by use of statistics maintained by the Indiana Department of Correction. The defendants' testimony demonstrated the inefficiency of those records. Robert Bronnenberg testified that the best records of violence at the prison would be found in the 2,000 separate inmate packets; they are not otherwise compiled. The information provided to the plaintiff came from investigators' log books; Jack Duckworth testified that those records would disclose only

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[5] As the trial went on, this theory disappeared from the case. The court gave no instruction on this theory, and no objection was raised to the failure to so instruct. The jury was instructed on more traditional Eighth Amendment theory.

allegations and would not reflect the actual incidence of violence.

IND. CODE 11-11-6-1(a)(4) specifically required the Indiana Department of Correction to maintain accurate records regarding incidents of violence. That statute, and the methods actually used, were directly pertinent to Mr. McGill's ability to make a statistical showing of the "reign of terror" he claimed to exist at the prison. No error was committed in taking judicial notice of the statute and informing the jury of its provisions.

C.

The defendants complain of the giving of Instructions 21-23. Those instructions, together with Instruction No. 20, informed the jury that:

20.

Under the Eighth Amendment, a prison official can be found liable for failing to protect a prison inmate from an attack by another

offender only if that official acts with "deliberate indifference", the plaintiff, Herbert F. McGill, must prove by a preponderance of the evidence that a defendant prison official intentionally or recklessly disregarded a substantial risk of danger that was known to him or would have been readily apparent to a reasonable person in his position.

21.

A Defendant acts with "deliberate indifference" when he knows of the danger or where the threat of violence is so pervasive that his knowledge may be inferred, yet he fails to enforce a policy or take other reasonable steps which may have prevented the harm. A defendant acts recklessly or with "reckless disregard" when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position.

22.

Accordingly, to prove his claim that he was subjected to cruel and unusual punishment, the plaintiff must establish, by a preponderance of the evidence, the following:

> First: that the defendant or defendants knew, or should have known, that the plaintiff had been threatened with violence or sexual assault and that it was highly foreseeable that the plaintiff would be physically or sexually

assaulted by another inmate; and

Second: That the defendant or defendants were deliberately indifferent to the plaintiff's constitutional right to be free from cruel and unusual punishment, either because the defendant or defendants intended to deprive him of some right or because they acted with reckless disregard of his right to be free from violent or sexual assaults by fellow inmates; and

Third: that such acts violated the plaintiff's right to be free from cruel and unusual punishment; and

Fourth: that the conduct of the defendant or defendants was the proximate cause of injury and consequent damage to the plaintiff.

If you find that the plaintiff has proved each of these propositions against any of the defendants, them you should find in favor of the plaintiff and against that defendant or those defendants.

If you find that the plaintiff has failed to prove each of these propositions against any of the defendants, then you should find in favor of that defendant or those defendants and against the plaintiff as respects that defendant or those defendants.

That means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appears from the evidence on the case that a person has information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts, then this person may be found to have had actual knowledge of these facts, the same as if he made such inquiry and had actually learned such facts.

That is to say, the law will charge a person with notice and knowledge of whatever he would have learned upon making such inquiry as it would have been reasonable to expect him to make under the circumstances.

Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain condition has existed for a substantial period of time and that the defendant or defendants had regular opportunities to observe the condition, then you may draw the inference that the defendant or defendants had knowledge of the condition.

The defendants challenge the objective nature of the inquiry allowed by these instructions. Phrases such as "or should ave known" and concepts such as the inquiry that would have been

reasonable under the circumstances, the defendants argue, have no place in Eighth Amendment jurisprudence. Indeed, the defendants contend that Instruction No. 23 effectively overruled Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985) cert. denied 479 U.S. 816 (1986).

Without question, a certain tension is inescapable when language from one Eighth Amendment case is aligned against language from another, different case. Such a tension, while challenging at times, should be unsurprising, for language appropriate to explain the holding in one case may be inappropriate in explaining another. Recognizing this, the court believes that the jury was instructed in accordance with law.

In Benson v. Cady, 761 F.2d 335 (7th Cir. 1985), the court affirmed dismissal of an inmate's complaint for

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In Benson v. Cady, 761 F.2d 335 (7th Cir. 1985), the court affirmed dismissal of an inmate's complaint for

failure to state a claim upon which relief can be granted. In the course of its ruling, the court reviewed the standards governing Eighth Amendment claims:

> It has long been established, however, that negligence, evidence by, interim alia,, simply inattention or inadvertence, may not form the basis for an eighth amendment claim. . . A plaintiff must prove deliberate indifference, evidence by either actual untent or reckless disregard. . . . Although the term "actual intent" is self-explanatory, reckless disregard is not. A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position. Recklessness is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation where a high degree of danger is apparent. . . . The standard is an objective one. . . . Although subjective awareness of the risk is no defense, the risk must be foreseeable. Indeed, risk is defined as a recognizable danger of injury. . . . The risk also must be substantial.

761 F.2d at 339 (emphasis added; citation omitted). Benson v. Cady, then, supports the inclusion of some objective standard in determining recklessness.

The defendants cite cases decided since Benson v. Cady which appeared to cast doubt on the continuing vitality of that objective standard. In Duckworth v. Franzen, 780 F.2d 645, a case that did not involve protection of inmates from assault by other inmates, the court offered an explanation and illustration that seemed to retreat from the possibility of an objective standard encompassing constructive knowledge:

> For example, if a prisoner tells the prison doctor that he is allergic to penicillin, but the doctor injects him with penicillin anyway and the prisoner has a severe reaction, the doctor is guilty of having inflicted a cruel and unusual punishment . . . But if before injecting him the doctor merely fails to tell the prisoner what is in the syringe, and thus gives

> the prisoner no chance to alert him to a possible (and quite common) allergy, the doctor is not guilty of violating the Eighth Amendment even if it is a palpable act of medical malpractice to inject someone with penicillin without first asking whether he is allergic. . . . In the first case the doctor knows there is a great danger, could avert it at trivial cost (though greater than in the case of reckless murder that we gave earlier), but instead ignores it. In the second case the doctor should know there is some danger, but he is inadvertent. Although it is conceivable if improbable that his inadvertence would be deemed unreasonable enough -- given the trivial burden of inquiry -- to make his conduct relevant in a tort sense, punishment cannot be inadvertent. Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.

780 F.2d at 653 (emphasis added; citations omitted). Even Duckworth v. Franzen however, retained the concept of "recklessness", equating it to the

criminal mens rea that "implies an act so dangerous that the defendant's knowledge of the risk can be inferred", 780 F.2d 652, a point for which it was cited with apparent approval in Whitley v. Albers, 475 U.S. 312, 321 (1986). The Duckworth court seemed to question the language from Benson v. Cady by citing it as among cases that "contain language more suggestive of the tort definition of recklessness than of the criminal law definition . . ." 780 F.2d at 653.

Yet the language of Benson v. Cady survived. In Richardson v. Penfold, 839 F.2d 392, 394-395 (7th Cir. 1988), the court articulated the standards as follows:

> The "reigning" law in this circuit under the eighth amendment states that a prison official will be liable for failing to protect an inmate from attacks if that official acts with "deliberate or

> callous indifference" toward inmates violates the due process clause of the fourteenth amendment. . . . A plaintiff can show "deliberate indifference" by proving that the prison official; acted with actual intent or recklessness. . . . "A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position." Benson v. Cady. .

(some citations omitted).

Based on the foregoing, the court concludes that Instructions 21 through 23 accurately state the law applicable to this case,[6] which, like Benson v.

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[6] Indeed, the defendants' trial brief cited Richardson v. Penfold in support of the proposition that, "To find any defendant liable, the court must determine that he acted with actual intent that harm be inflicted or in disregard of 'a substantial risk of danger that either [was] known to him or would [have been] apparent to a reasonable person in his position.'"

Cady and Richardson v. Penfold, involved an assault by a fellow inmate. If Richardson v. Penfold did not overrule Duckworth v. Franzen (and it did not, and did not need to), either did the instructions in this case. These instructions, like Duckworth v. Franzen, permitted liability to "reckless disregard" but not for "gross negligence". See Walsh v. Mellas, 837 F.2d 789, 794-795 (7th Cir.), cert. denied 108 S.Ct. 2832 (1988). To hold, as the defendants apparently argue, that only actual knowledge can give rise to a finding of deliberate indifference, would reward proson officials for blinking risks of which they should be aware.

The court's instructions did not warrant a finding for the plaintiff simply because a defendant should have

known of the risks to Mr. McGill; Instriction No. 20 informed the jury that the defendant must have "intentionally or recklessly disregarded a substantial risk of danger" of which the defendant had actual or constructive knowledge. Viewed together, the court's instructions accurately stated the use governing Eighth Amendment claims arising from assaults by fellow inmates.

D.

Accordingly, the court concludes that the defendants' motion for a new trial should be denied.

II.

As noted above, the defendants move for judgment n.o.v., raising several arguments concerning sufficiency of the evidence and immunity under the Indiana Tort Claims Act. Mr. McGill challenges the defendants' right to raise these

arguments, noting that while the Defendants moved for a directed verdict at the close of his case-in-chief (and that mation was granted with respect to some claims and some defendants), they did not renew their motion at the close of all the evidence. Mr. McGill is correct that the defendants did not renew the directed verdict motion at the close of all the evidence. The court disagrees, however, that in light f this failure, Fed. R. Civ. P. 50(b) precludes the court from considering even part of the motion.

The Seventh Circuit has adopted an approach to such issues more flexible than that employed in some other circuits. See Bonner v. Coughlin, 657 F.2d 931, 938-939 (7th Cir. 1981). In Villenueva v. McInnis, 723 F.ed 414 (5th Cir. 1984), the defendant had informed the court and opposing counsel of the

perceived shortcomings of the plaintiff's case in the motion made at the conclusion of the plaintiff's evidence and objected to the court's instructions on grounds of insufficiency of the evidence. The Fifth Circuit held the issue sufficiently preserved, citing Bonner v. Coughlin with approval.

So, too, did these defendants inform the court and Mr. McGill's counsel of at last some of the perceived inadequacies of Mr. McGill's evidence to support his federal claim.

In McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1556 (7th Cir. 1987), the court explained:

> The modern rationale for the rules that a motion for directed verdict is a prerequisite to judgment n.o.v. is that the opposing party should have a chance to rectify (or at least seek the court's leave to rectify) deficiencies in his evidence before it is too late, that is, before the case goes to the jury.

The defendants' motion (while not renewed) and objections to the instructions were sufficient to achieve this purpose with respect to some of the arguments they seek to raise now. But the court can consider only those points that were raised in the motion at close of the plaintiff's case-in-chief. As the McCarty court further explained:

> After both motions for directed verdict (the plaintiff's on contributory negligence, and the defendant's on negligence) were denied, the defendant had no reason to think it hadn't put in enough evidence to get to the jury on the issue of liability. If the plaintiff thought otherwise she had to move for a directed verdict on that issue.

826 F.2d at 1556.

Accordingly, to the extent the issues were presented at trial, the court will address the defendants' motion for judgment n.o.v. This case was tried too well to turn on an unim-

portant procedural misstep. The first order of business, however, must be to determine the extent of which the issues raised in the post-trial motion were raised in the in-trial motion.

As to the Eighth Amendment claim[7], the defendants argued at the close of Mr. McGill's evidence that no deliberate indifference had been shown, because action was taken each time Mr. McGill requested a move for the sake of safety. The defendants argued that Mr. McGill had not shown that the move to IDU placed him in any particular danger,

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[7] The court granted the defendants' motion for directed verdict with respect to Mr. McGill's due process claim, and, while the directed verdict motion was denied with respect to the punitive damages claims, the jury awarded no punitive damages. Accordingly, the court need only examine the defendants' arguments with respect to the Eighth Amendment claim and the state negligence claim.

particularly from Ausley. The defendants noted that Mr. McGill had not informed anyone of his fear of Ausley, and neither Mr. McGill nor Ausley were identifiable categories that would put the defendants on notice of any height-

ened risk; accordingly, the defendant could have had no actual knowledge of the risk to Mr. McGill. The defendants did not, they argued, intentionally expose Mr. McGill to a known danger. Finally, the defendants argued, Mr. McGill had not made out a "reign of terror" case.

With respect to the pendent negligence claim, the defendants argued in their motion for directed verdict that while they had a duty to take reasonable steps to protect inmates, no breach of duty had been shown because they acted whenever Mr. McGill asked them to act.

Only Mr. McGill knew of the threat by Ausley, and Mr. McGill told nobody. The defendants further argued that the injury of which Mr. McGill complained was not foreseeable because Mr. McGill presented no evidence that Ausley was an assaultive person or in any category that posed a threat to Mr. McGill. The defendants argued that IND. CODE 11-11-6-1(a), discussed above, did not apply to this case because it imposes duties on the state department, not on the defendants who were sued in their individual capacities; further, if it assumed that the policies required by statute were not adopted, Mr. McGill had not shown that the failure to adopt policies proximately caused his un-juries; further, under Indiana's Tort Claims Act, the enforcement of, or failure to enforce a statute, is an affirmative defense. Finally, the

defendants argued, training and supervision are discretionary functions, and they are immune from state tort liability for discretionary acts.

Following this review of the defendants' motion for directed verdict, the court concludes that the following portions of their j.n.o.v. may be considered under Bonner v. Coughlin, 657 F.2s 931: paragraphs 1(a)-(d), 2(a) & (c)-(d), 3, 4, 5 and 6. Under McCarty v. Pheasant Run, Inc., 826 F.2d 1554, the court may not consider paragraphs 2(b), 7, 8, or 9 because the defendants did not place the plaintiff on notice of those asserted deficiencies in his

case.[8]

A.

To establish entitlement to judgment, the defendants must demonstrate that the evidence, when viewed in a light most favorable to the plaintiff, so overwhelmingly favors the defendants "that no contrary verdict could ever

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[8] Paragraph 2(b) asserted that Mr. McGill presented no evidence that Ausley was serving disciplinary or administrative segregation (Charles Wright, however, testified that plaintiff's Exhibit 21 indicated that Ausley was at IDU for disciplinary segregation). Paragraphs 7 and 8 asserted that the defendants were performing discretionary acts and so were immune from state tort liability under IND. CODE 34-4-16.5-3 (6). Paragraph 9 asserted that each defendant was immune from state tort liability under IND. CODE 34-4-16.5-3(9) because the injury resulted from the act of another and that under IND. CODE 34-4-16.5-3(7) Mr. Duckworth and Mr. Bronnenberg were immune from state tort liability for adoption and enforcement of, or failure to adopt and enforce, a rule or regulation.

stand. . . . A trial." Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290, 1294 (7th Cir. 1988).

1.

In paragraphs 1(a)-(c) of their motion, the defendants argue that Mr. McGill's evidence affirmatively showed that no defendant had actual knowledge of any threat to Mr. McGill and that Mr. McGill presented no evidence showing that Ausley was (or should have been) known to be particularly aggressive or that Mr. McGill ever had been sexually attacked in any way before his transfer to the detention unit. The defendants also argue that Mr. McGill presented no evidence showing that he was exposed to a pervasive risk of harm while housed in the detention unit, but since the case was not submitted to the jury on a "reign of terror" theory, the court

views this argument as being subsumed under the other tow arguments.

Mere lack of due care in preventing an attack in an inmate does not give rise to liability under § 1983, Jones v. Haelman, 869 F.2d 1023, 1031 (7th Cir. 1989); accord, Davidson v. Cannon, 474 U.S. 344 (1986), but if the attacks occur so frequently as to be pervasive, or if the inmate belonged to an identifiable group of individuals for whom the risk of attack was a serious problem of substantial dimensions, deliberate indifference may be inferred.

In Merriwether v. Faulkner, 821 F.2d 408, 417-418 (7th Cir.), cert denied 484 U.S. 935 (1987), the court held that a transsexual inmate's complaint states a claim upon which relief can be granted when it alleged that the inmate had been assaulted even in administrative segregation; the court

said that "given that she is a transsexual housed in an all-male prison, the risk of assault would appear to be sufficiently serious to require the defendants to take some minimal measures to protect her form assault."

In Watts v. Laurent, 774 F.2d 168, 173-174 (7th Cir. 1985), cert. denied 475 U.S. 1085 (1986), the court summarized the evidence as follows:

> . . . each of the defendants was an eyewitness on at least one occasion to an explicity threat made against Watts by Greaves. Moreover, the evidence taken in a light most favorable to plaintiff established that in evaluating the potential seriousness of that threat each defendant was armed with the knowledge that Greaves was physically much larger than Watts, and that the two lived in the same cottage. Various testimony supported the inference that gang activity permeated the Youth Center and that Graves was a gang leader while Watts resisted joining any gang. The defendants were directly responsible for observing and supervising residents' behav-

> ior, and they were in almost daily contact with both Watts and Greaves. Under these circumstances we agree with the trial court that the evidence was sufficient to demonstrate that defendants . . . . knew there was a strong likelihood of an assault, and therefore the court did not err in refusing to grant a judgment notwithstanding the verdict.

In Richardson v. Penfold, 839 F.2d 392 (7th Cir. 1988), the plaintiff-inmate reported a sexual assault to a guard named Dyer, but refused to identify his assailants. Dyer later allowed one of the assailants into the plaintiff's cell, along with another inmate, dispute the plaintiff's pleas that Dyer not leave him alone with those two inmates; the plaintiff was raped again. He was raped still again two days later. The district court's grant of summary judgment to the defense was reversed on appeal. The court reasoned that the

plaintiff had come forth with evidence to indicate that Dyer knew the assailants had raped other inmates. Further:

> Even if Dyer could not reasonably know that Birch raped Richardson the first time, a jury could reasonably conclude that he deliberately chose to allow Birch into Richardson's cell after Richardson had already reported one rape and begged Dyer to protect him from another. Based on Staggers's and Richardson's allegations, a jury could have reasonably found that Dyer had shown indifference to the rapes of Richardson or a willingness to allow the attacks after learning of a strong likelihood that Richardson would be raped.

839 F.2d at 396.

In Walsh v. Mellas, 837 F.2d 789 (7th Cir), cert. denied 108 S.Ct. 2832 (1988), prison officials were held liable in a suit involving one inmate's attack on another. In an interesting wrinkle in the facts of the case at bar, the inmate in Walsh felt he would be safer in disciplinary segregation than

in protective custody, and so refused a work assignment. In disciplinary segregation, however, inmates were double-celled; the prison placed Walsh in a cell with a gang-affiliated inmate over Walsh's objection, and Walsh was stabbed and strangled. The district court found that the defendants knew of the prison's serious problems with gang activity, that the risk of gang violence against targeted inmates was real and significant, and that Walsh was an inmate targeted for gang retaliation; despite that knowledge, the defendants devised and operated a classification system that ignored the risk.

In Little v. Walker, 552 F.2d (7th Cir. 1977), cert. denied 435 U.S. 932 (1978), the district court had dismissed a complaint on the basis of what would now be considered qualified immunity. The plaintiff alleged that he had

requested protective segregation status to avoid violent gang affiliated inmates and to avoid being disciplined for refusing to work in gang-dominated areas of the prison. Protective segregatees, however, were subject to the same denials of privileges as were disciplinary segregatees, and safekeepers were placed in a cell house "where the inmates most prone to violence are also housed." 552 F.2d at 195. Gang-affiliated inmates served meals to the safekeepers and, according to the complaint, withheld meals unless the safekeepers performed sexual acts through the cell bars. The complaint further alleged that the defendants "ignored plaintiff's entreaties to remedy the situation." Id. Gang-affiliated inmates later took over the cellhouse during a riot, after which the

plaintiff continued to be assigned to that cell house.

In deciding the immunity issue, the Little court stated that during the time in which the prisoner was at the penitentiary "it was already well settled that the treatment he received while in Segregation-Safekeeping status was cruel and unusual punishment." 552 F.2d at 197. The court cited Estelle v. Gamble, 429 U.S. 97 (1976), for th proposition that, "Violent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are manifestly 'inconsistent with contemporary standards of decency.'. . . "Deliberate indifference' to these happenings 'constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment.'"

None of the foregoing cases clearly dictate resolution of Mr. McGill's

claim. Somewhat less happened to Mr. McGill than happened to the plaintiff in Little v. Walker; the threat posed by inmates on disciplinary segregation to smaller, protective custody inmates such as Mr. McGill was somewhat less identifiable than the risk posed by gang-affiliated inmates in Walsh v. Mellas and Watts v. Laurent or by other inmates from whom the known rape victim begged for protection in Richardson v. Penfold; the risk of sexual assault upon Mr. McGill in any event was somewhat less than the risk of sexual assault on the transsexual in Meriwether v. Faulkner.

But none of those cases purport to state a constitutional baseline of factual minimum; none profess that a lesser showing cannot make out a case of deliberate indifference. The principles enunciated in these cases indicate that Mr. McGill presented sufficient evidence

from which the jury reasonably could have found that defendants Duckworth, Bronnenberg and Webb were deliberately indifferent to Mr. McGill's safety.

The jury reasonably could have found that Mr. McGill, a man of slight build, was harassed by other inmates, some of whom made sexual suggestions, commencing immediately upon his arrival at the State Prison. Willie Eugene McCann, who was an institutional investigator in 1984, testified that Mr. McGill had come to him several times about harassment (although it is unclear whether Mr. McGill related the sexual suggestions) and that he advised Mr. McGill to "try to stick it out", but also told him that protective custody was available.

Mr. McGill later told Mr. McCann of his observations of an inmate's attack in a correctional officer and heard

himself referred to as, and threatened physically for being, a "snitch". Accordingly, he asked Mr. McCann for admission to protective custody. He was not aware until his arrival at IDU that he would be placed in a unit that housed inmates held in disciplinary segregation; he was not aware until the second day of his confinement on IDU that inmates were released from their cells for recreation and showers.

The jury also reasonably could have found that IDU had a somewhat higher incidence of violence and sexual attacks than the prison as a whole. Defendant Bronnenberg, who served as assistant superintendent of the prison in 1984, testified that he was aware of incidents of violence between inmates in protective custody and inmates in disciplinary segregation, but implemented no change in policy. Charles Wright, who in 1984

was a case manager assigned to disciplinary units (including IDU), testified that weaker inmates generally were more vulnerable to attack on IDU and admitted saying that he routinely told inmates on protective custody to protect themselves because he had seen many such inmates assaulted, especially "young white boys" trying to get away from the general population. He further testified that he and those who worked on IDU did not check out the reasons why an inmate sought protective custody because others make that decision.

Mr. Wright testified that he advised incoming protective custody inmates at IDU not to mix with inmates on disciplinary segregation. Mr. Bronnenberg testified that he instructed staff to handle protective custody inmates with care and allow them to remain by themselves while at IDU, but

conceded that those instructions were not put in writing. The IDU population report for the time Mr. McGill was there did not identify Mr. McGill as a protective custody inmate, and defendant Brian Webb, a correctional officer on duty during the attack on Mr. McGill, testified that as far as he knew that day Mr. McGill was a disciplinary case. Mr. Webb also testified that he knew that Ausley was "one of the rowdy ones" who had been at IDU before. The IDU population report indicated that Ausley was at IDU for disciplinary reasons.

These facts, which a reasonably jury could have found to be true from the evidence at trial, are sufficient to impute to defendants Duckworth, Bronnenberg, and Webb knowledge that protective custody inmates, particularly "young, white boys", were at physical risk from disciplinary segregation

inmates while at IDU. Despite this knowledge, Mr. Duckworth (the prison's superintendent) and Mr. Bronnenberg (the assistant superintendent) continued unchanged the policy of commingling the two classes of inmates at IDU. They issued no policy directive concerning the separation of the two classes of inmates. As a result, Mr. McGill was placed on the IDU with disciplinary inmates and was released from his cell (a release that was afforded only fifteen minutes each day) with disciplinary inmates, including his ultimate assailant, Ausley.

Whether any of the defendants could have specified Ausley as Mr. McGill's ultimate assailant is unimportant.[9] The

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[9] The defendants' motion for judgment n.o.v. states that Mr. McGill presented no evidence that Ausley was known, or should have been known, to be particularly aggressive in any way; Officer Webb, however, testified that he knew Ausley to a be a "rowdy one" not on his first visit to IDU.

jury could have found that the harm that Mr. McGill suffered was foreseeable and that the defendants had or should have had knowledge of the risk of harm: the risk of harm to protective custody inmates at the hands of disciplinary inmates was well known, and every sexual attack that had been reported at the prison that year had occurred at IDU. Mr. McGill suffered precisely that harm at the hands of one in the class that threatened him, and a reasonable jury policy of commingling the two classes of inmates, Mr. Duckworth and Mr. Bronnenberg were deliberately indifferent to that risk.

Officer Webb had no say in the continuation of the policy; he was simply a correctional officer who worked in IDU. Nonetheless, the day after the assault, Officer Webb prepared a report that denied that the assault had

occurred. Officer Webb wrote that Mr. McGill had gone nowhere near the shower and Ausley had not entered the shower. Having found that the attack occurred as Mr. McGill related it, the jury could have inferred that Officer Webb lied. They jury further reasonably could have found, as Mr. McGill testified, that when Mr. McGill tried to tell Officer Webb what had happened, Officer Webb cut him off with the statement, "Piss on you." The jury reasonably could have inferred that as he patrolled the IDU before and during the attack, Officer Webb was deliberately indifferent to the known risk of danger to Mr. McGill.

2.

In paragraphs 2(a), (c) and (d) of their motion, the defendants argue that Mr. McGill failed to demonstrate a causal connection between their acts and omissions and Mr. McGill's injury. For

the reasons set forth above, the court believes that the evidence was sufficient for a reasonable jury to find such a causal connection.

3.

In paragraphs 3-6 of their motion, the defendants challenge the sufficiency of Mr. McGill's evidence on his pendent state negligence claim. They argue that:

> - Mr. McGill presented no evidence that any defendant did not take reasonable steps to protect him from foreseeable danger or harm and so he failed to prove a breach of duty (¶ 3);
>
> - Mr. McGill presented no evidence to indicate that the attack and injury were foreseeable to any defendant (¶ 4); and

- Mr. McGill failed to present evidence that any defendant could have acted in any other way that would have avoided the attack on Mr. McGill (¶ 5).

Recognizing that something more than mere negligence is necessary to support an Eighth Amendment claim, it would seem somewhat anomalous to find the evidence sufficient to support the federal claim but not the state negligence claim, and the court does not so find.

Under Indiana law, negligence consists of three elements: (1) a duty on the part of an actor; (2) breach or failure to perform that duty; and (3) damages or injuries proximately resulting to another. Cowe v. Forum Group, Inc., 541 N.E.2d 962, 966 (Ind.App. 1989). Whether a duty exists is a

question of law. Snyder Elevators, Inc. v. Baker, 529 N.E.2d 855, 857 (Ind.App. 1988). Under Indiana law, "a public official, charged with the custody and care of a prisoner, owes a private duty to the prisoner to take reasonable precautions under the circumstances to preserve his life, health and safety. . ." Roberts v. State, 159 Ind.App. 456, 307 N.E.2d 501, 505 (1974). The evidence outlined above is sufficient to allow a reasonable jury to find that the defendants breached that duty.

The evidence outlined above also is sufficient to meet Indiana's test of foreseeability:

> The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a resilt which might reasonably have been anticipated in the ordinary experience of men. Geyer v. City of Logansport (1977) 267 Ind. 344, 370

> N.E.2d 333, 337. If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of harm, or the manner in which it occurred does not preclude liability. Id. Thus, liability does not depend on whether the defendant could have predicted injury would happen to the plaintiff in exactly the way it did or the statistical likelihood of the particular circumstances which befell the plaintiff. On the other hand, if the actor should have realized his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence. Tabor v. Continental Baking Co. (1941), 110 Ind.App. 633, 38 N.E.2d 257, trans, denied, citing Restatement [Torts], § 435, comment b.

Harper v. Guarantee Auto Stores, 533 N.E.2d 1258, 1264 (Ind.App. 1989).

The defendants' final preserved argument, in support of its motion for judgment is that the evidence unequivocally demonstrated that Mr. McGill

incurred the risk of his injury by voluntarily leaving his cell and walking to the shower with Ausley, knowing that Ausley had threatened him. Under Indiana law, incurred risk is an affirmative defense upon which the defendant bears the burden of proof. Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944). The defense "is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which the actor voluntarily enters, so long as those risks are known and understood by the actor." Clem v. United States, 601 F.Supp. 835, 844 (N.D. Ind. 1985). The defense requires a subjective analysis of the risk. Kroger Co. v. Haun, 177 Ind.App. 403, 379 N.E.2d 1004 (1978).

The Indiana Supreme Court recently stressed the importance of the voluntariness prong of the defense:

> When incurred risk is at issue, the question often arises whether the plaintiff could or should have retreated once the danger and risk became apparent. We have held that even when a danger is known and appreciated, continued exposure to it does not amount to incurring its risk where there is no reasonable opportunity to escape from it or where the exposure is the result of influence, circumstances or surroundings which are a real inducement to continue despite the danger.

Get-N-Go, Inc. v. Markins, 544 N.E.2d 484, 487 (Ind. 1989). In Get-N-Go, the court held that even though the plaintiff decided to continue on to the sore after discovering the icy conditions outside the store, her acceptance of the risk was not altogether voluntary in light of her need for food for her next day's breakfast to avoid a possible adverse reaction to her insulin.

Mr. McGill presented evidence on inducement far greater than that which led Mrs. Markins to cross the Get-N-Go's

icy parking lot. Mr. McGill testified that when he came out of his cell, Ausley began pushing him toward the shower, saying, "Come on, come on." Mr. McGill told Ausley he was going back to his cell, but Ausley said if Mr. McGill kept fighting, Ausley would through him "over the range". Mr. McGill testified that he kept trying to turn around, but Ausley kept pushing him toward the shower.

This evidence, if credited by the jury, was sufficient to warrant a finding that the defendants had not met their burden of proving that Mr. McGill voluntarily incurred the risk of his injury.

III.

Finally, the defendants argue that the judgment should be modified to prevent Mr. McGill from receiving a double recovery for his injury. The

jury received separate verdict forms on the state claim (for which judgment would be joint and several) and the federal claim (for which judgment would be individual); the defendants agreed to that procedure. On the federal claim, the jury awarded damages in the sum of $8,000.00 against Mr. Webb and $1,000.00 each against Mr. Duckworth and Mr. Bronnenberg. On the state claim, the jury awarded damages in the sum of $10,000.00 against all three defendants. The defendants describe the awards as "clearly duplicative" and ask that the judgment be modified in some unspecified manner as to limit Mr. McGill's recovery to a total of $10,000.00, citing Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979).

Mr. McGill disagrees that entry of judgment on both theories of liability provides him a double recovery, but does

not detail the scenarios that he claims would refute the defendants' contention. Further, he notes that the defendants sought no instruction to prevent double recovery, participated in devising the verdict forms, and neither sought clarification of the verdicts nor asked to poll the jury before it was discharged. Under these circumstances, Mr. McGill argues, the defendants are simply asserting a claim of error that they invited.

The parties' briefs provide the court with insufficient information on which to rule. The court cannot determine from the defendants' brief the manner in which they believe the judgment should be altered. Should judgment be entered in accordance with the § 1983 verdict, producing individual liability, and, if so, what is to be done with Mr. McGill's state rights concerning joint

liability? Should judgment be entered in accordance with the state law negligence verdict, and, if so, what would remain of Mr. McGill's claim to be a "prevailing party" for purposes of 42 U.S.C. § 1988? Not surprisingly, since the defendants' brief leaves these issues untouched, Mr. McGill has offered nothing on those issues either.

Further, the court cannot ascertain from Mr. McGill's brief what scenarios he may have in mind that would allow interpretation of the verdicts as something other than duplicative. Finally, the defendants have offered no response to Mr. McGill's arguments concerning waiver and invited error.

Accordingly, the court shall schedule a hearing on the defendants' motion to amend judgment to invite counsel's thoughts on these and other related issues.

IV.

For the foregoing reasons, the court now DENIES IN PART the defendants' motion for judgment notwithstanding the verdict, for new trial, and to amend judgment, as follows:

A. Insofar as the motion seeks judgment notwithstanding the verdict, the motion is DENIED;

B. Insofar as the motion seeks a new trial, the motion is DENIED; and

C. Insofar as the motion seeks to amend the judgment to limit the plaintiff's recovery to $10,000.00, the court schedules a hearing on the motion to be held at 1:30 p.m. on December 19, 1989.

SO ORDERED.

ENTERED: November 30, 1989

ROBERT L. MILLER, JR., Judge
United States District Court

cc: D. Pagos, F. Parkerson
D. Arthur, T. Quigley

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS

United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

October 4, 1991

Linley E. Pearson, Esq.
OFFICE OF THE ATTORNEY GENERAL
Federal Litigation
219 State House
Indianapolis, IN 46204-2794

RE: Nos. 90-1845 and 90-1945 -
Herbert F. McGill, Plaintiff-Appellee, Cross-Appellant
vs.
Jack R. Duckworth, Robert Bronnenberg and Brian Webb, Defendants-Appellants, Cross-Appellees

Dear Counsel:

The Court has directed the Clerk to request counsel for the Appellants-Cross-Appellees in the above appeals to file an answer to the petition for rehearing with suggestion for rehearing

APPENDIX "C"

NOT CONTINUOUS.

en banc filed by counsel for the Appellee-Cross-Appellant on October 2, 1991.

Twenty-five copies of the answer, not to exceed fifteen pages in length and bound by the same color cover as your brief, will be required. They will be due by October 18, 1991.

Sincerely,

Thomas F. Strubbe
Clerk

cc: Donald W. Pagos, Esq., SWEENEY, DABAGIA, DONAGHUE and THORNE, P.O. Box 769, 709 Franklin Square, Michigan City, IN 46460

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois

October 18, 1991

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

HERBERT F. MCGILL, Plaintiff-Appellee Cross-Appellant	)	Appeals from the U.S. District Court for the Northern Dist. of IN, South Bend Div. No. 85-C-70 Robert L. Miller Judge
v.	)	
Nos. 90-1845 and 90-1945	)	
JACK R. DUCKWORTH, et al, Defendants-Appellants Cross-Appellees	)	

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO STRIKE PETITION FOR REHEARING" filed herein on October 7, 1991, by counsel for the appellants-cross-appellees.

2. "RESPONSE TO MOTION TO STRIKE FOR REHEARING" filed herein on October 17, 1991, by counsel for the appellee-cross-appellant.

McGill's petition for rehearing is untimely and was accepted in error by the clerk. The time expired on October

1, 1991, and the petition was received on October 2. Counsel did not seek an extension of time. Defendants filed a motion to strike the petition.

The court called for a response, in which McGill explained that he deposited the petition in the mail on October 1 and submits that this should be deemed sufficient. It is not. Fed. R. App. P. 40(a) allows 14 days for filing a petition for rehearing. "[F]iling shall not be timely unless the papers are received by the clerk within the time fixed for filing". Fed. R. App. P. 25(a). Mailing is not the same thing as receipt.

Rule 25(a) creates a single exception: "[B]riefs and appendices shall be deemed filed on the date of mailing of the most expeditious form of delivery by mail, excepting special delivery, is

used." There in no exception for petitions for rehearing.

McGill contends that a petition for rehearing is a "brief". He cites no authority for this proposition, and obviously his own lawyer did not believe it at the time. The Rules of Appellate Procedure (and our local rules) establish elaborate requirements for the form and content on "briefs", none of which McGill complied with. Instead counsel (properly) complied with the rules established for the form and content of petitions for rehearing.

Petitions for rehearing affect the issuance of mandate and the timeliness of petition for certiorari. It is accordingly important that factors affecting time be established with precision-- something possible only if time is calculated by filing rather than mailing. Rule 25(a) is not obscure;

counsel dies not point to anything in this court's opinions or handbook that led him astray. I therefore conclude that there is no reason to grant the alternative request for a belated extension of time. Extensions depend on good cause; inattention to the rules of procedure is not good cause.

The motion to strike is GRANTED. The clerk shall return the petition to counsel for McGill. Counsel should recognize that the time to seek review in the Supreme Court commenced to run on September 17 (the date of our judgment) and has not been extended.